STATE OF MICHIGAN

COURT OF APPEALS

MASTERGUARD HOME SECURITY, d/b/a MASTERGUARD SECURITY SERVICES, BOB SHONCE, and TOM WALTERS, Plaintiffs-Appellants,	UNPUBLISHED July 29, 2010
v	No. 291085 Oakland Circuit Court
NEMES AND ANDERSON, P.C., d/b/a NEMES BUMBAUGH, P.C., THOMAS C. NEMES, JAMES A. BUMBAUGH, and RYAN A. MCKINDLES, Defendants-Appellees.	LC No. 2008-089579-NM

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

In this legal malpractice case, plaintiffs Masterguard Home Security, Bob Shonce, and Tom Walters (collectively, "Masterguard") appeal as of right the trial court's order granting defendants Nemes And Anderson, P.C., Thomas C. Nemes, James A. Bumbaugh, and Ryan A. McKindles (collectively, "Nemes & Anderson") summary disposition under MCR 2.116(C)(7) and (10). We affirm.

I. BASIC FACTS

In 1998, Bob Shonce and Tom Walters founded Masterguard Home Security, doing business as Masterguard Security Services, to sell and service residential alarm systems. In 2001, Alliance Security Network offered to buy the company. And, in January 2001, Masterguard and Alliance entered into a purchase agreement for the sale of Masterguard to Alliance. Pursuant to the original purchase agreement terms, the transaction would be a cash sale, by which Shonce and Walters would receive cash proceeds at the transaction closing. However, the parties later entered into an amended purchase agreement, by which Shonce and Walters would receive a subordinated promissory note instead of the simple cash sale. The promissory note required Alliance to make periodic payments to Shonce and Walters over a two-year period.

Notably, Masterguard claims that Nemes & Anderson reviewed the note and advised Masterguard to sign it, which Masterguard did, claiming not to know that the note was subordinated to that of another creditor. Nemes & Anderson, however, denies this allegation.

In September 2001, Masterguard and Alliance closed on the sale, and Alliance began making payments on the promissory note. However, in May 2002, Alliance stopped making payments. Masterguard then retained Nemes & Anderson to assist with enforcement of the promissory note. And, to that end, Masterguard, through Nemes & Anderson, filed a breach of contract suit against Alliance.

Following the filing of the complaint, Masterguard and Alliance entered settlement negotiations, which resulted in a June 2002 settlement agreement, by which they agreed to a modified payment schedule. Paragraph 7 of the settlement agreement stated that Alliance "shall use reasonable efforts to secure this Settlement Agreement with a pledge of its accounts second only to SLP for which [Alliance] shall execute a UCC-1 and Security Agreement in support thereof." Shonce expressed concern about this provision, questioning why Masterguard would "leave it up to [Alliance] to file a UCC." However, despite his concerns, Shonce signed the agreement in July 2002.

Alliance complied with the payment schedule through August 2005, when it filed for Chapter 11 bankruptcy. In September 2005, Masterguard received notice that Alliance had listed it in the bankruptcy filings as an unsecured creditor. Masterguard was surprised at its unsecured status because it believed that it had a secured interest, based on the June 2002 settlement agreement. Accordingly, Masterguard retained Nemes & Anderson to seek reclassification of Masterguard as a secured creditor. But in July 2006, the bankruptcy court determined that Masterguard was an unsecured creditor.

As part of the bankruptcy proceeding, Alliance filed a counterclaim against Masterguard, asserting that Masterguard violated the parties' non-compete agreement. Masterguard and Alliance ultimately negotiated a settlement by which Masterguard agreed to an unsecured claim in the amount of $90,000 in exchange for Alliance's withdrawal of its non-compete claim. Accordingly, in January 2007, the bankruptcy court entered a stipulated order stating that Masterguard "shall have a general unsecured claim in the amount of $90,000.00[.]" And, pursuant to the approved reorganization plan, Masterguard received a right to a total payment of 30 percent of its claim, or approximately $30,000.

On July 26, 2007, Masterguard filed this legal malpractice claim against Nemes & Anderson, alleging that Nemes & Anderson failed to properly represent Masterguard regarding the June 2002 settlement agreement. More specifically, Masterguard took issue with the fact that paragraph 7 of the settlement agreement left it to Alliance to perfect the security interest between the parties, which ultimately led to Masterguard's status as an unsecured creditor. Nemes & Anderson moved for summary disposition under MCR 2.116(C)(7), arguing that Masterguard's complaint was time-barred because Masterguard filed it more than two years after Nemes & Anderson's representation of Masterguard ended in July 2002, when Masterguard executed the settlement agreement. Nemes & Anderson also moved for summary disposition under MCR 2.116(C)(10).

In its written opinion and order, the trial court explained that "[t]his malpractice action arises from a July 2002 Settlement Agreement entered into between [Masterguard] and Alliance . . . which restructured payments owed to [Masterguard] pursuant to a Subordinated Promissory Note." The trial court ruled that "the execution of the 2002 Settlement Agreement was the completion of legal services that [Nemes & Anderson] were retained by [Masterguard] to perform" and that, therefore, Masterguard's "claims for malpractice accrued in July of 2002 when that Settlement Agreement was executed." The trial court noted that Masterguard had "not argued that the 6 month discovery rule is applicable" and concluded that, "[p]ursuant to the 2 year statute of limitations for legal malpractice actions," Masterguard was required to file its complaint by July 2004. Accordingly, the trial court held that Masterguard's claims were time-barred and granted Nemes & Anderson summary disposition under MCR 2.116(C)(7). The trial court also held that, alternatively, summary disposition was appropriate under MCR 2.116(C)(10) because Masterguard failed to establish that Nemes & Anderson's conduct proximately caused it to suffer any damages as the result of being an unsecured creditor. Masterguard now appeals.

II. STATUTE OF LIMITATIONS

A. STANDARD OF REVIEW

Masterguard argues that the trial court erred in granting Nemes & Anderson's motion for summary disposition under MCR 2.116(C)(7) because its complaint was timely filed within two years of the date on which Nemes & Anderson discontinued its representation of Masterguard.

Under MCR 2.116(C)(7), a party may move for summary disposition on the ground that a statute of limitations bars a claim. Neither party is required to file supportive material; any documentation that is provided to the court, however, must be admissible evidence.[1] The plaintiff's well-pleaded factual allegations must be accepted as true and construed in the plaintiff's favor, unless contradicted by documentation submitted by the movant.[2] Absent disputed issues of fact, we review de novo whether the cause of action is barred by a statute of limitations.[3]

B. LEGAL STANDARDS

Generally, no person may bring an action charging malpractice unless he commences the action within two years of when the claim accrued.[4] A legal malpractice claim "accrues at the time [the attorney] discontinues serving the [client] in a professional . . . capacity as to the

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[1] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

[2] MCR 2.116(G)(5); *Maiden*, 461 Mich at 119; *Gortney v Norfolk & W R Co*, 216 Mich App 535, 538-539; 549 NW2d 612 (1996).

[3] *Colbert v Conybeare Law Office*, 239 Mich App 608, 609 NW2d 208 (2000).

[4] MCL 600.5805(6); *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 571; 703 NW2d 115 (2005).

matters out of which the claim for malpractice arose."[5] The fact that an attorney later represents the same client in a separate matter does not extend the period of limitations.[6] A lawyer discontinues service when the client or the court relieves him of the obligation, or when he completes the specific legal service that the client retained him to perform.[7]

C. APPLYING THE STANDARDS

In support of its argument that its legal malpractice complaint was timely, Masterguard argues that the accrual statute's use of the plural word "matters"[8] indicates the Legislature's intent that the alleged malpractice can arise out of multiple matters. And here, Masterguard contends that Nemes & Anderson continued to represent it during the bankruptcy proceeding. However, the fact that an attorney later represents the same client in a separate matter does not extend the period of limitations; that is, an attorney's consecutive representation of the same client in a different matter does not affect the original date of accrual.[9]

In *Balcom v Zambon*, the defendants represented the plaintiff in two different actions arising out of a bar brawl.[10] The attorneys first represented the plaintiff in a criminal proceeding and then later represented the plaintiff in a civil action.[11] The plaintiff then later brought a legal malpractice claim, alleging that the attorneys committed malpractice by (1) failing to obtain a valid written release of civil liability in the underlying criminal matter, and (2) failing to have the circuit court enter an order denying his motion for summary disposition in the civil case.[12] After noting that an attorney discontinues serving a client upon completion of a specific legal service that the attorney was retained to perform, this Court pointed out that, although the plaintiff's legal malpractice claim was filed within two years of the civil case arising out of a bar brawl, it was not filed within two years of the earlier criminal litigation.[13] Therefore, this Court held that the trial court erred in dismissing the plaintiffs' claim arising out the civil action, but that the trial court did not err in dismissing the plaintiff's claim arising out the criminal proceeding.[14]

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[5] MCL 600.5838(1); see also *Kloian v Schwartz*, 272 Mich App 232, 237; 725 NW2d 671 (2006).

[6] *Balcom v Zambon*, 254 Mich App 470, 484; 658 NW2d 156 (2002).

[7] *Id.*

[8] MCL 600.5838(1) (emphasis added).

[9] *Balcom*, 254 Mich App at 484.

[10] *Id*. at 472-475.

[11] *Id*.

[12] *Id*. at 475-476.

[13] *Id*. at 484.

[14] *Id*. at 484-485.

Here, Masterguard retained Nemes & Anderson to file its breach of contract claim against Alliance in May 2002. That lawsuit ultimately resulted in the June 2002 settlement agreement, which was fully executed in July 2002. And in this legal malpractice action, Masterguard now claims that Nemes & Anderson failed to protect Masterguard's interests as a secured creditor in that settlement agreement. Thus, Masterguard's legal malpractice claim arises out of the settlement agreement, and Nemes & Anderson discontinued serving Masterguard *as to that matter* when Masterguard executed the settlement agreement in July 2002.[15] That is, Nemes & Anderson's representation of Masterguard in the breach of contract action ceased upon the conclusion of that action, which occurred when the parties executed the settlement agreement.[16] Masterguard's malpractice claim does not arise out of Nemes & Anderson's conduct during the bankruptcy proceeding, for which Masterguard again retained Nemes & Anderson after a three-year interruption in service. Thus, the fact that Masterguard retained Nemes & Anderson again in the subsequent, separate bankruptcy proceeding does not affect the date of accrual for the original malpractice. Therefore, Masterguard was required to file its legal malpractice complaint within two years of the July 2002 accrual, or no later than July 2004. It did not file its complaint until July 2007, therefore Masterguard's claim is time-barred under the general two-year statute of limitations.

We note that at oral argument Masterguard's counsel brought up, for the first time, the Michigan Supreme Court's decision in *Levy v Martin*,[17] in which the Court adopted JUDGE WHITBECK's dissent in the underlying Court of Appeals decision.[18] However, *Levy* is distinguishable from the present case. In *Levy*, the plaintiffs retained the defendant accountants to prepare their annual tax returns from 1974 to 1996.[19] Due to the accountants' improper preparation of the 1991 and 1992 tax returns, the IRS audited the plaintiffs and required them pay additional taxes and penalty charges.[20] The plaintiffs filed a malpractice claim against the accountants in 1997, which the trial court dismissed as untimely.[21] The Supreme Court held that the plaintiffs' claim did not accrue until at least 1996 because it was "clear" that the plaintiffs, "rather than receiving professional advice for a specific problem, were receiving generalized tax preparation services[.]"[22] However, here, unlike the plaintiffs in *Levy*, Masterguard did not receive generalized legal services from Nemes & Anderson; instead, Masterguard received legal

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[15] See MCL 600.5838(1); *Kloian*, 272 Mich App at 237.

[16] *Balcom*, 254 Mich App at 484 (stating that a lawyer discontinues service when he completes the *specific* legal service that the client retained him to perform).

[17] *Levy v Martin*, 463 Mich 478; 620 NW2d 292 (2001).

[18] *Levy v Martin*, unpublished opinion per curiam of the Court of Appeals, issued Sept. 17, 1999 (Docket No. 207797).

[19] *Levy*, 463 Mich at 481.

[20] *Id*.

[21] *Id*.

[22] *Id*. at 486, 489.

advice from Nemes & Anderson for a specific legal problem—the breach of contract action, which ended in the settlement agreement.

Because our resolution of this statute of limitations issue is dispositive, we need not address Masterguard's remaining argument regarding the trial court's ruling granting Nemes & Anderson summary disposition under MCR 2.116(C)(10).

We affirm.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck